the scope of head-of-state immunity in contexts such as this, see *id.* at 193a.

The government sought reconsideration of the district court's ruling that petitioners had properly effected service of process on ZANU-PF through Mugabe and Mudenge. See Pet. App. 98a. Pursuant to Federal Rule of Civil Procedure 24, the government also moved to intervene for the purpose of taking a later appeal. Pet. App. 114a. The district court denied the motion for reconsideration but granted the motion to intervene. *Id.* at 120a. The court subsequently entered a default judgment against ZANU-PF and awarded petitioners more than $71 million in compensatory and punitive damages. *Id.* at 5a, 94a-96a.

5. The United States appealed the default judgment entered against ZANU-PF, and petitioners cross-appealed the district court's dismissal of their claims against Mugabe and Mudenge. The court of appeals affirmed in part and reversed in part, holding that petitioners' complaint should have been dismissed in its entirety. Pet. App. 1a-28a.

a. The court of appeals first held that the United States had standing to appeal the district court's judgment. Pet. App. 5a-11a. The court explained that, to have standing to appeal, a litigant must demonstrate an injury caused by the lower court's judgment. *Id.* at 5a. The court concluded that the United States was injured by the default judgment against ZANU-PF because that judgment impaired the ability of the United States (i) to ensure its compliance with its treaty obligations and (ii) to establish the terms upon which foreign diplomats are received. *Id.* at 11a.

b. The court of appeals affirmed the district court's dismissal of petitioners' claims against Mugabe and

Mudenge. Pet. App. 12a-22a. The court recognized that Section 11(a) of the U.N. Convention is inapplicable to this suit because immunity under Section 11(a) is limited to "acts done by [temporary representatives] in their capacity as representatives," and petitioners' claims do not arise out of such acts. *Id.* at 13a (quoting U.N. Convention art. IV, § 11(a), 21 U.S.T. at 1426, 1 U.N.T.S. at 20). The court observed, however, that Section 11(g) of the U.N. Convention extends to temporary representatives any additional privileges and immunities that are afforded to diplomatic envoys so long as those privileges and immunities are "not inconsistent with" Section 11(a)-(f). *Ibid.* (quoting U.N. Convention art. IV, § 11(g), 21 U.S.T. at 1428, 1 U.N.T.S. at 22). The court explained that the Vienna Convention grants diplomatic envoys "a much more robust form of immunity from legal process than that afforded by section 11(a) of the U.N. Convention on Privileges and Immunities," since Article 31 of the Vienna Convention "broadly immunizes diplomatic representatives from the civil jurisdiction of the United States courts." *Ibid.*

Petitioners contended that "extend[ing] to Mugabe and Mudenge the full measure of immunity set forth in Article 31 of the Vienna Convention would be 'inconsistent with' section 11(a) of the U.N. Convention on Privileges and Immunities because section 11(a) expressly limits the scope of immunity from legal process that temporary U.N. representatives can enjoy." Pet. App. 14a. The court of appeals rejected that argument. While viewing the phrase "inconsistent with" as ambiguous standing alone (*id.* at 15a), the court concluded that "the understandings of the treaty signatories and the views of the executive branch * * * overwhelmingly support an interpretation of section 11(g) that would

accord the full protection of Article 31 of the Vienna Convention to temporary U.N. representatives." *Id.* at 16a. The court of appeals further held that petitioners' suit does not implicate any of Article 31's limited exceptions to the immunity of diplomatic envoys from civil jurisdiction, see *id.* at 20a-22a, and it therefore affirmed the district court's dismissal of petitioners' claims against Mugabe and Mudenge, see *id.* at 22a.

c. The court of appeals next held that the personal "inviolability" that Mugabe and Mudenge enjoyed under Article 29 of the Vienna Convention (as applied to them through Section 11(g) of the U.N. Convention) precluded petitioners from using them as involuntary agents for service of process on ZANU-PF. Pet. App. 23a-28a. The court observed that personal inviolability is one of the oldest and most universally recognized of diplomatic privileges and immunities, and that it serves both to protect the diplomat's dignity and to ensure that he can perform his responsibilities without hindrance. *Id.* at 27a. The court further explained that the adverse "practical consequences of allowing service of process upon diplomatic agents * * * are equally likely to follow whether the diplomat (or the U.N. representative enjoying diplomatic immunity) is served as an agent for a private entity or as an agent for a foreign government." *Id.* at 28a. The court of appeals therefore concluded that Article 29 "protected Mugabe and Mudenge from service of process as agents for ZANU-PF," and it directed the district court to dismiss petitioners' claims against ZANU-PF for lack of proper service. Pet. App. 28a.[3]

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[3] Because the court of appeals held that the diplomatic immunity and personal inviolability of Mugabe and Mudenge provided a sufficient

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 11-19) that the United States lacked standing to appeal the default judgment entered against ZANU-PF. The court of appeals correctly rejected that argument. See Pet. App. 5a-11a.

a. More than 80 years ago, this Court recognized that the United States has standing to sue to prevent a violation of the government's treaty obligations, even in the absence of statutory authorization for the suit. *Sanitary Dist.* v. *United States*, 266 U.S. 405, 425-426 (1925). The lower federal courts have continued to apply that principle. See, *e.g.*, *Roeder* v. *Islamic Republic of Iran*, 333 F.3d 228, 233-234 (D.C. Cir. 2003) (United States had standing to intervene as defendant to seek dismissal of suit that violated the Algiers Accords), cert. denied, 542 U.S. 915 (2004); *United States* v. *City of Glen Cove*, 322 F. Supp. 149, 152 (E.D.N.Y.) (United States had standing to sue to prevent state action that would violate treaty obligation), aff'd, 450 F.2d 884 (2d Cir. 1971) (per curiam); cf. *United States* v. *County of Arlington*, 669 F.2d 925, 928-929 (4th Cir.) (United States could sue to ensure compliance with treaty obligations), cert. denied, 459 U.S. 801 (1982). Petitioners offer no plausible reason to doubt that the government's interest in ensuring compliance with the United States'

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basis both for affirming the district court's dismissal of petitioners' claims against those individuals, and for reversing the district court's default judgment against ZANU-PF, the court did not decide whether head-of-state immunity would provide an additional ground for dismissal of petitioners' suit. See Pet. App. 22a-23a.

treaty obligations is likewise sufficient to confer standing to appeal.

Contrary to petitioners' contention (Pet. 13), the court of appeals did not abdicate its responsibility to rule on the question of treaty interpretation presented by this case. In resolving the threshold question of appellate jurisdiction, the court of appeals determined that, because the United States had adequately alleged an impairment of its ability to ensure compliance with its treaty obligations, the United States had standing to appeal. See Pet. App. 7a-8a. But in deciding the *merits* of the government's appeal, the court—giving appropriate weight to the views of the Executive Branch—construed the relevant treaty provisions and held that Mugabe and Mudenge were entitled to the personal inviolability and diplomatic immunity conferred upon diplomatic envoys by Articles 29 and 31 of the Vienna Convention. See Pet. App. 13a-20a, 23a-28a. That mode of analysis was entirely appropriate. In any event, the court of appeals' ultimate resolution of the case clearly would have been the same if the court had treated an *actual* treaty violation as a prerequisite to the government's appellate standing.

b. Article II, Section 3 of the Constitution assigns to the President the power to "receive Ambassadors and other public Ministers." That power encompasses the authority "to dictate the terms upon which foreign diplomats are received in this country." Pet. App. 9a. As the court of appeals correctly held, the United States has a judicially cognizable interest, sufficient to confer standing on appeal, in "guarding its authority to set the terms upon which foreign ambassadors are received." *Id.* at 11a; see Vienna Convention art. 29, 23 U.S.T. at 3240, 500 U.N.T.S. at 110 ("The person of a diplomatic agent

shall be inviolable. * * * The receiving state * * * shall take all appropriate steps to prevent any attack on [the diplomatic agent's] person, freedom or dignity.").

Petitioners' reliance (Pet. 14-16) on *Raines* v. *Byrd*, 521 U.S. 811 (1997), is misplaced. In *Raines*, this Court held that six individual members of Congress lacked standing to challenge the constitutionality of the Line Item Veto Act, 2 U.S.C. 691 *et seq.*, because the plaintiffs "alleged no injury to themselves as individuals [and] the institutional injury they allege[d] [wa]s wholly abstract and widely dispersed." 521 U.S. at 829. As the court of appeals correctly held, *Raines* "is distinguishable in crucial respects from the instant case." Pet. App. 10a.

Most significantly, *Raines* involved a purely intragovernmental dispute in which all parties to the case were members of either the Legislative or Executive Branch. This Court emphasized that Article III courts have historically declined to intercede in disputes between the political Branches. See *Raines*, 521 U.S. at 826-829. Here, by contrast, a live controversy exists between the United States and petitioners themselves, who are private parties rather than federal officials.

In *Raines*, moreover, the plaintiffs alleged only that the Line Item Veto Act would cause an "abstract dilution of institutional legislative power" (521 U.S. at 826) with respect to hypothetical *future* enactments. See *id.* at 825-826. In the instant case, the United States alleged and demonstrated a concrete impairment of the President's ability to ensure compliance with specific treaty obligations and to define the terms on which particular foreign envoys will be received. Finally, the Court in *Raines* "attach[ed] some importance to the fact that [the plaintiffs] ha[d] not been authorized to repre-

sent their respective Houses of Congress in this action, and indeed both Houses actively oppose[d] their suit." *Id.* at 829. The briefs filed on behalf of the United States in this case, by contrast, represent the position of the Executive Branch as a whole.[4]

2. On the merits, the court of appeals held that, under Section 11(g) of the U.N. Convention, Mugabe and Mudenge were entitled to the protections afforded to diplomatic envoys under Articles 29 and 31 of the Vienna Convention. See Pet. App. 12a-22a, 23a-28a. Petitioners contend (Pet. 19-24) that the court of appeals' holding is inconsistent with the text of Section 11 of the U.N. Convention. That argument lacks merit.

a. Petitioners' argument is based on the fact that the "immunity from legal process of every kind" provided by Section 11(a) of the U.N. Convention applies "in respect of words spoken or written and all acts done by [temporary representatives to the United Nations] in their capacity as representatives." U.N. Convention art. IV, § 11(a), 21 U.S.T. at 1426, 1 U.N.T.S. at 20. That immunity is inapplicable here because the wrongs alleged in petitioners' complaint do not involve acts performed by Mugabe and Mudenge "in their capacity as representatives." As the court of appeals recognized (Pet. App. 13a), however, Section 11(a) of the U.N. Con-

[4] The court of appeals' determination that the United States had standing to appeal was premised solely upon "the Government's interests in (1) ensuring that the United States does not violate its treaty obligations, and (2) guarding its authority to set the terms upon which foreign ambassadors are received." Pet. App. 11a. Contrary to petitioner's suggestion (see Pet. 15), the court did not purport to define the circumstances under which the Executive or Legislative Branch could intervene in a pending lawsuit to appeal a lower court's construction of a federal statute, and its decision has no necessary implications for such hypothetical proceedings.

vention is not the exclusive source of immunity for temporary representatives to the United Nations. In addition, Section 11(g) of the same Convention vests temporary representatives with "such other privileges, immunities and facilities not inconsistent with [Section 11(a)-(f)] as diplomatic envoys enjoy." U.N. Convention art. IV, § 11(g), 21 U.S.T. at 1428, 1 U.N.T.S. at 22.

Among the privileges and immunities that "diplomatic envoys enjoy" are the personal inviolability and immunity from legal process that are guaranteed by Articles 29 and 31 of the Vienna Convention. The court of appeals correctly held that those protections are "not inconsistent with" Section 11(a)-(f) of the U.N. Convention and are therefore available to United Nations envoys pursuant to Section 11(g). Pet. App. 13a-19a. Petitioners cite no decision that has construed the relevant treaty provisions in a different manner.

b. Petitioners contend (Pet. 22) that the court of appeals' decision "nullifies the limitations set forth in Section 11(a) [of the U.N. Convention], rendering that subsection completely superfluous and meaningless." Petitioners' argument ignores the fact that the scope of immunity afforded to diplomatic envoys, either pursuant to treaty or as a matter of customary international law and practice, is potentially subject to change over time. Section 11(a) of the U.N. Convention ensures that temporary representatives to the United Nations will always receive at least a specified minimum level of protection, without regard to the extent of the immunities that are available to diplomatic envoys at a particular point in time. Section 11(a) therefore is not superfluous, even assuming that the immunities it confers are currently embraced within the broader protections afforded by the Vienna Convention.

c. In construing "difficult or ambiguous" treaty language, a court "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." *Volkswagenwerk Aktiengesellschaft* v. *Schlunk*, 486 U.S. 694, 700 (1988) (quoting *Air France* v. *Saks*, 470 U.S. 392, 396 (1985)). Because the Executive Branch is charged by the Constitution with negotiating and implementing international agreements, its interpretation of disputed treaty provisions is "given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961). And because no treaty becomes effective until approved by the Senate, evidence as to the Senate's understanding of treaty language is also relevant to a court's interpretation. *United States* v. *Stuart*, 489 U.S. 353, 367-368 & n.7 (1989).

During the Senate's consideration of the U.N. Convention, the State Department Legal Adviser expressed the Executive Branch's understanding that, under the Convention, "nonresident representatives [to the United Nations] would * * * receive full diplomatic privileges and immunities." Pet. App. 17a (quoting S. Exec. Rep. No. 17, 91st Cong., 2d Sess. 12 (1970)). The report prepared by the Senate Committee on Foreign Relations stated the same view. See S. Exec. Rep. No. 17, *supra*, at 3 ("Under the [U.N. Convention], these nonresident representatives will also be entitled to full diplomatic immunities."). In addition, a 1976 opinion of the United Nations Secretary General confirmed that "Section 11 of the Convention in fact confers * * * diplomatic privileges and immunities on" temporary representatives. 1976 U.N. Jurid. Y.B. 227, U.N. Doc. ST/LEG/SER.C/14 (quoted at Pet. App. 18a-19a). Those materials amply support the court of appeals' conclusion that "[S]ection

11(g) extends to temporary U.N. representatives like Mugabe and Mudenge the full range of immunity from legal process afforded by Article 31 of the Vienna Convention," Pet. App. 19a, as well as the personal inviolability protected by Article 29, see *id.* at 23a-24a.[5]

3. Petitioners contend (Pet. 26-29) that, even if Mugabe and Mudenge were entitled to the protections accorded diplomatic envoys under the Vienna Convention, they could still be treated as involuntary agents for service of process on ZANU-PF. That argument lacks merit.

a. As this Court recognized nearly 200 years ago, "a consent to receive [a foreign minister], implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform." *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch.) 116, 139 (1812). In addition to impugning the dignity of both the foreign envoy

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[5] Relying on *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176 (1982), petitioners contend that courts may resort to evidence of the parties' shared understanding of a treaty "only if that shared interpretation flows from plain language in the treaty itself." Pet. 24. As the Court in *Sumitomo* recognized, the correct interpretation of a treaty provision will be *particularly* clear when extrinsic evidence of the signatories' understanding confirms the plain meaning of a treaty's text. See 457 U.S. at 185. The Court in *Sumitomo* did not suggest, however, that extrinsic materials may be consulted *only* for that purpose. To the contrary, this Court has consistently recognized that extrinsic evidence may properly be considered when a court construes an ambiguous treaty provision. See, *e.g.*, *Schlunk*, 486 U.S. at 700; see also Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 32, 1155 U.N.T.S. 331, 340 (explaining that "the preparatory work of [a] treaty and the circumstances of its conclusion" may be considered when application of other interpretive principles "[l]eaves the meaning ambiguous or obscure").

and the government he represents, treatment of an envoy as an involuntary agent for service of process on an organization with which he is affiliated may impair the envoy's performance of his assigned functions. Service of process on Mugabe and Mudenge effectively required those officials to determine the significance of the documents and to inform others at ZANU-PF of the pendency of the suit, thus diverting Mugabe and Mudenge from their official duties. In addition, the ultimate effect of the district court's ruling on service of process was that an organization of which Mugabe and Mudenge are senior officers was subjected to a large default judgment that could not have been entered if the two officials had remained outside this country or had eluded process servers.[6]

In a variety of ways, deeming foreign envoys to be proper involuntary agents for service of process on private organizations could hinder diplomatic relations between the United States and other nations. Foreign envoys might be deterred from visiting this country. Foreign diplomats who enter the United States could feel pressured to sever their organizational ties or to limit their activities within this country while they are present.[7] And independent of any such concrete effect

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[6] Petitioners' reliance (Pet. 27) on *Henderson* v. *United States*, 517 U.S. 654 (1996), is misplaced. Although one important purpose of service of process is to give the defendant notice of a pending lawsuit, petitioners do not and cannot dispute that the district court's award of a default judgment against ZANU-PF depended upon the court's holding that Mugabe and Mudenge were properly treated as involuntary agents for service upon the organization.

[7] Mugabe and Mudenge were potential agents for service of process upon ZANU-PF only because of their status as officers of that political party. See Fed. R. Civ. P. 4(h)(1) (service upon a corporation or unin-

on an envoy's behavior, a United States court's condonation of an affront to the envoy's dignity may act as an irritant in our relations with the diplomat and the government he represents.

Use of foreign envoys as involuntary agents for service of process could also disrupt the conduct of this Nation's foreign policy by subjecting United States diplomats to like treatment abroad. As the court of appeals observed, "permitting service of process on foreign diplomats could be construed as a hostile act and, thus, could invite retaliatory practices in otherwise friendly countries." Pet. App. 27a-28a (citing *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 981 n.5 (D.C. Cir. 1965)); cf. *Wei Ye* v. *Jiang Zemin*, 383 F.3d 620, 629 (7th Cir. 2004) (holding that head-of-state immunity precluded use of a foreign head of state as an involuntary agent for service on a third party; court relied in part on the representation of the Executive Branch that "it would be a 'great offense if foreign states and their courts were to encourage process servers to hound our President when he is abroad to conduct important negotiations with his foreign counterparts'"), cert. denied, 544 U.S. 975 (2005). The court of appeals correctly declined to permit such risks.

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corporated association may be made "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process"); Pet. App. 189a (petitioners argued in the district court that ZANU-PF "was properly served with process through the personal service effectuated on Mugabe and Mudenge in their capacities as senior officers of the party"). Neither Mugabe and Mudenge, nor any other foreign diplomat having an affiliation with a private organization sufficient to render him a potential agent for service of process, could realistically be expected to be indifferent to the prospect of a default judgment against the organization.

b. In *Hellenic Lines*, the District of Columbia Circuit invoked the practical concerns described above in holding (before the enactment of the FSIA) that a Tunisian diplomat could not be used as an involuntary agent for service of process upon a foreign state. See 345 F.2d at 980-981 & n.5. Petitioners seek to distinguish *Hellenic Lines*, noting that the issue in that case "was whether a diplomat could be served as an agent *of a foreign government*, not as an agent of a private, non-immune entity like ZANU-PF." Pet. 28. As the court of appeals explained in the instant case, however, "[n]othing in the D.C. Circuit's reasoning turned on the identity of the defendant." Pet. App. 28a. Rather, the crucial holding of *Hellenic Lines* is that service of process upon a foreign diplomat as agent of another entity may prove disruptive even though the diplomat himself is not being haled into court.

Because "the practical consequences of allowing service of process upon diplomatic agents * * * are equally likely to follow whether the diplomat (or the U.N. representative enjoying diplomatic immunity) is served as an agent for a private entity or as an agent for a foreign government," Pet. App. 28a; see pp. 16-17 & note 7, *supra*, the rationale of *Hellenic Lines* is fully applicable here. The court of appeals' application of *Hellenic Lines* to the present context is especially appropriate in light of the Executive Branch's judgment that use of a foreign envoy as an involuntary agent for service on a private organization would fully implicate the concerns described in that case. Cf. *Wei Ye*, 383 F.3d at 630 (deferring to Executive Branch determination that service of process on a foreign head of state "in order to reach an intended co-defendant in the same suit could frustrate this Nation's diplomatic objectives"). In any event, peti-

tioners identify no decision that has drawn the distinction they advocate or that has approved the use of foreign diplomats as involuntary agents for service of process on private organizations. Absent a conflict in authority, the question presented does not warrant this Court's review.[8]

4. Even if review by this Court were otherwise warranted to clarify the scope of protections accorded to temporary representatives under Section 11(g) of the U.N. Convention, this case would not be an appropriate vehicle for construing that treaty. Independent of the protections to which they were entitled as temporary representatives to the United Nations, Mugabe and Mudenge were immune from all forms of legal process by virtue of the Executive Branch's assertion of head-of-state immunity.[9]

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[8] Petitioners suggest (Pet. 28) that the resolution of the service-of-process issue may be affected by the fact that the underlying claims arise under 28 U.S.C. 1350 and the TVPA. Petitioners identify no provision of either statute, however, that bears on the question presented here. And while the TVPA's legislative history contains expressions of Executive Branch concern that the statute might exacerbate international tensions (see Pet. 28 n.16), there is no basis for inferring that Congress intended to supersede all existing mechanisms for safeguarding international comity. To the contrary, the relevant House Report specifically states that "nothing in the TVPA overrides the doctrines of diplomatic and head of state immunity." H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 5 (1992).

[9] The assertion of head-of-state immunity on behalf of Foreign Minister Mudenge is consistent with international practice. See *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 2002 I.C.J. 3, 20-21 (drawing parallel in terms of immunity and inviolability between "certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs"); *id.* at 22 ("[T]he functions of a Minister for Foreign Affairs are such that, throughout the duration of his or her

As required by separation-of-powers principles, courts have consistently accepted Executive Branch assertions of head-of-state immunity. See note 1, *supra*. An assertion of immunity made by the Executive Branch on behalf of a foreign head of state is a political decision not subject to review by the courts. "[I]n the constitutional framework, the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state. * * * [F]lexibility to react quickly to the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive rather than by judicial decision." *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988); accord, *e.g.*, *Wei Ye*, 383 F.3d at 628-630 (court deferred to the Executive Branch's assertion of head-of-state immunity on behalf of China's President, and to its determination that the immunity encompassed protection from service of process as agent for another entity); *Spacil* v. *Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive.").

Here, the Executive Branch asserted head-of-state immunity on behalf of Mugabe and Mudenge and in-

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office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity and that inviolability protect the individual concerned against any act of authority of another State which would hinder him or her in the performance of his or her duties."). That is particularly evident in light of the fact that Mudenge was part of Mugabe's entourage at the relevant time. See 1 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 817 (2d rev. ed. 1945) ("As a matter of practice, the head of a foreign State, who enters the territory of any other, enjoys, together with his personal suite, exemption from local jurisdiction.").

formed the district court that the immunity extended to all forms of legal process. C.A. App. 327, 336. That assertion was binding on the court. Thus, even if Mugabe and Mudenge did not enjoy diplomatic immunity and personal inviolability under the U.N. Convention, the district court was required to dismiss the claims against them on the ground of head-of-state immunity, and to dismiss the claims against ZANU-PF for lack of proper service. Accordingly, this case does not present an appropriate vehicle for considering the scope of immunity afforded to temporary representatives under the U.N. Convention.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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IN THE

# Supreme Court of the United States

No. 05-879

ADELLA CHIMINYA TACHIONA, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND TAPFUMA CHIMINYA TACHIONA, EFRIDAH PFEBVE, ON HER OWN BEHALF AND ON BEHALF OF HER LATE BROTHER METTHEW PFEBVE, ELLIOT PFEBVE, ON HIS OWN BEHALF AND ON BEHALF OF HIS BROTHER METTHEW PFEBVE, EVELYN MASAITI, ON HER OWN BEHALF, MARIA DEL CARMEN STEVENS, ON HER OWN BEHALF AND ON BEHALF OF HER LATE HUSBAND DAVID YENDALL STEVENS,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF FOR PETITIONERS

1. The Government fails to address the central issue raised in the petition for certiorari: Whether the Government has standing to appeal for the sole purpose of challenging a district court's ruling on a procedural issue that does not bind the Government and where the only party bound by the court's ruling opts not to appeal. *See* Pet. i. Nor does the Government address this Court's recent expression of

" 'grave doubts' " about whether any party may appeal a judgment that is not binding on it. App. 7a (quoting *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 66 (1997)). The Government's silence is understandable, for there is not a single case—until this one—recognizing appellate standing in circumstances like these.

Having waived its response on the actual question presented, the Government instead advances the extraordinary argument that it has appellate standing to intervene whenever a lower court adopts an allegedly erroneous interpretation of a treaty or constitutional provision. In other words, the Government's view is that it can intervene, appeal, and seek correction of a purportedly erroneous ruling whenever a court disagrees with the Executive Branch's views regarding treaty law or the Constitution, all without regard to whether the Executive is bound by the ruling. This position has no support in this Court's precedent or even in any lower court precedent. What is more, both of the interests identified by the Second Circuit as being sufficient to confer appellate standing contradict this Court's precedent.

a. Relying exclusively on cases involving private party conduct that allegedly violated an international treaty, the Government maintains that its "interest in ensuring compliance with the United States' treaty obligations is * * * sufficient to confer standing to appeal." Opp. 9-10. The Government misses the point. Petitioners never disputed that the Government would have standing to intervene in a case (either in the district court or the court of appeals) to stop a private party from *violating* a treaty; the Executive Branch's constitutional authority to enforce treaties obviously includes violations by private parties. But that is not this case. Here, the Second Circuit permitted the Government to intervene merely because the Government disagreed with the District Court's *interpretation* of a treaty. *See* App. 7a ("the Government argues that the district court's decision interferes with its obligation to ensure that the United States complies

with the Vienna Convention on Diplomatic Relations"). By prioritizing the Executive Branch's preferred interpretation over the Judiciary's, the Second Circuit dispatched with the established rule that it is the responsibility of the federal courts to interpret and apply federal law—including treaties. *See* Pet. 13.[1]

The Government attempts to downplay the critical difference between the cases it cites (involving potential treaty violations by private parties) and this case (involving a mere interpretion disagreement with the judiciary). But there is no principle of treaty or constitutional law that allows the Executive Branch to step into the shoes of a private party and request an advisory opinion on appeal just because the Executive thinks that an inferior court misinterpreted the law. The Government would clearly lack authority to appeal a district court decision involving a private dispute that implicates federal law simply because the Government disagrees with the court's reasoning. This same principle holds fast when the federal law at issue is a treaty.

b. The Government cannot identify a single case recognizing appellate standing based on the notion that a district court decision "usurped" the Executive Branch's constitutional authority. Pet. 14-15. Lacking any affirmative support for its position, the Government—like the Second Circuit—resorts to trying to distinguish this case from *Raines* v. *Byrd*, 521 U.S. 811 (1997). The Government's distinctions fail.

The Government's primary argument is that "*Raines* involved a purely intra-governmental dispute," whereas

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[1] Indeed, this Court has often rejected the Executive's interpretation of a treaty. *See* Pet. 13 (citing *Chan* v. *Korean Air Lines, Ltd.*, 490 U.S. 122, 134-135 (1989); *Perkins* v. *Elg*, 307 U.S. 325, 337-342 (1939); *Johnson* v. *Browne*, 205 U.S. 309, 319-321 (1907)); *see also* U.S. Const., art. III, § 2, cl.1 ("The judicial Power shall extend to all Cases * * * arising under * * * Treaties.").

petitioners here "are private parties rather than federal officials." Opp. 11. Of course, the Government has never once alleged that petitioners' own conduct somehow "usurped" the Executive Branch's constitutional authority. Rather, the only theory ever advanced by the Government in this case is that the District Court usurped the Executive's authority and caused a cognizable injury by rejecting the Executive's preferred interpretation of treaties. In other words, the Government itself has consistently treated this case as an intra-branch dispute—precisely like *Raines*.

The Government also attempts to distinguish *Raines* as involving only the "abstract dilution" of legislative power resulting from "hypothetical future enactments." Opp. 11. But the same is true here. The Government has never explained how the District Court's decision burdens its legal rights, much less what concrete, immediate injuries were caused it by the District Court's interpretation. Nor can the Government distinguish *Raines* on the ground that the suit in that case had not been authorized by Congress. Opp. 11-12. The Government already conceded in the District Court that 28 U.S.C. § 517, the statute that authorized it to submit "suggestions" as a "non-party" to the trial court, "does not on its face permit the United States to initiate proceedings in a court where no proceedings are pending." *See* Letter to Hon. Victor Marrero from Assistant United States Attorney David Jones (Dec. 18, 2001). *Raines* directly applies and should have dictated the outcome in this case; yet the Second Circuit reached the opposite conclusion.[2]

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[2] The Government does not contest that its theory would have allowed it to appeal even if the plaintiffs had lost on the merits of their claims and chosen not to appeal because the alleged injury stemmed from the service of process ruling. *See* Pet. 19. Such intervention in private litigation solely to appeal procedural rulings that are not binding on the Government when neither of the private parties chooses to appeal seeks nothing more than an advisory

c. The Government's sole remaining interest is in overturning unfavorable precedent. *See* Pet. 16-19. Under *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, 633-634 (1944), however, an intervenor lacks standing to pursue an independent appeal when its sole interest in the case is its disagreement with the lower court's interpretation of a legal issue. The Government candidly admitted in the District Court that its " 'sole[]' " interest in this case was to protect its " 'conduct of international relations from harms that would result from any erosion of immunities afforded visiting foreign heads of state and diplomats' " as a result of the District Court's ruling. Pet. 18 (quoting U.S. Gov't Mem. in Supp. Reconsideration (Nov. 16, 2001)). The Government's intervention therefore falls quite clearly under the rule of *Boston Tow*; yet the Second Circuit ignored that controlling precedent as well.

2. The petition presents another important and recurring issue of national consequence as well as a fundamental question of international law: Whether a temporary representative to the United Nations is immune from service of process when that process seeks jurisdiction over an otherwise non-immune private entity of which the representative is an official. The Second Circuit's unwarranted expansion of immunity ignores this Court's clear dictates that a court must follow the clear and unambiguous language of a treaty. *See* Pet. 13 n.7, 19-20 (citing cases standing for this proposition). And the Second Circuit's holding has grave implications for victims of torture seeking redress under the Torture Victims Protection Act and the Alien Tort Statute. The decision allows temporary U.N. representatives to solicit, directly and on American soil, funding and support for a private entity responsible for multiple acts of torture. The

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opinion. No authority sanctions advisory opinions merely because a case involves foreign relations or treaty interpretation.

result: two statutes previously of great use in bringing redress to torture victims rendered essentially toothless.[3]

The Second Circuit's ill-considered expansion of diplomatic immunity has profound precedential impact because the United Nations is headquartered in that circuit. Because of this geographical fact, there is little possibility of a circuit split on the fundamental question of international law at issue here; other federal courts of appeals are unlikely ever to encounter this issue. Even without a circuit split, moreover, this question is vital to interpreting the scope of immunity for visiting United Nations representatives.

a. " 'The object of [this Court] granting writs of certiorari on points of statutory or treaty interpretation is to determine the correctness of fundamental points that lower courts have resolved * * *.' " Pet. 26 (quoting *Chan*, 490 U.S. at 134-135). No one disputes that Section 11(a) of the U.N. Convention on Privileges and Immunities ("U.N. Convention") does not protect Mugabe or Mudenge from suit in this case. Section 11(a) specifically limits a temporary U.N. representative's immunity from legal process to acts "done by them in their capacity as representatives." Section 11(a)'s prefatory language similarly explains that temporary representatives enjoy immunity only "while exercising their functions[4] and

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[3] A 2004 study by the International Human Rights Law Clinic at the University of Berkeley Boalt Hall School of Law reveals that of the approximately 99 ATS cases decided over the last 30 years, 2 were decided in the 1970s, 15 were decided in the 1980s, 35 were decided in the 1990's, and 47 were decided from 2000 to 2004. *See* Alien Tort Claims Act Case Compendium, Int'l Human Rights Law Clinic, University of Berkeley Boalt Hall School of Law (Mar. 2004), *available at* http://www.law.berkeley.edu/clinics/ihrlc/pdf/ACTA.pdf.

[4] The decision below conflicts with the established rules of treaty interpretation by equating the prefatory language of Section 11—"while exercising their functions"—with the far broader

during their journey to and from the place of meeting." U.N. Convention, art. IV, § 11. *See* App. 13a; Pet. 21-22; Opp. 12. The Second Circuit should have hewed to the treaty's clear and unambiguous language. But instead it accomplished through Section 11(g)'s generic catch-all provision what was *specifically* foreclosed by Section 11(a).

b. The Government does not (for it cannot) dispute the legion of cases requiring a court to follow the clear and unambiguous language of a treaty. *See* Pet. 13 n.7, 19-20 (citing cases). Yet the Government still defends the Second Circuit's interpretation of the U.N. Convention. Its arguments are meritless.

The Government first argues that the U.N. Convention is "ambiguous" and therefore the Second Circuit's resort to extrinsic evidence was proper. *See* Opp. 14, 15 n.5. Wrong; there is nothing ambiguous in the least about Section 11(a)'s limited immunity grant. The Government next makes the never-before raised argument—unsupported by any authority—that Section 11(g) does not render Section 11(a) meaningless because "the scope of immunity afforded to diplomatic envoys * * * is potentially subject to change over time." Opp. 13. Because the scope of immunity may change, the Government's argument goes, Section 11(a) ensures that temporary representatives will always receive a minimum level of protection without regard to the immunities available to diplomatic envoys at a particular point in time. *Id.* But Section 11(a) is not some dormant failsafe, to be invoked only in the event of some hypothetical future change in the scope of diplomatic immunity. It is the polestar for determining immunity from legal process under the U.N. Convention. And Section 11(g), for its part, encompasses only those Vienna Convention protections that are "not inconsistent" with other parts of Section 11. Incorporat-

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phrase "during the entire period of presence in the State * * * for reasons of the conference in question." App. 19a; Pet. 24 n.15.

ing the Vienna Convention's broader protections from legal process is plainly inconsistent with Section 11(a)'s more limited scope.

c. Nowhere in its opposition does the Government squarely take issue with Petitioner's argument that the Second Circuit's holding effectively grants immunity to an otherwise non-immune private entity. *See* Pet. 29. Instead, the Government apparently accepts that unacceptable consequence as an inevitable result of its position regarding inviolability. *See* Opp. 15-17. The Government views service of process, which serves a notice function for a non-immune private entity in this case, as *always* precluded by inviolability. By sweeping service of process for a third party into its inviolability analysis, the court below drastically disrupted this Court's view of service of process.[5] *See* Pet. 27 (citing *Henderson* v. *United States*, 517 U.S. 654, 671-672 (1996) (setting forth this Court's understanding that "the core function of service is to supply notice of pendency of a legal action")). And the U.N. Convention itself belies the Government's position by specifying that the immunities afforded to representatives are "not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of *their functions in connection with the United Nations.*" U.N. Convention, art. IV, § 14 (emphasis added). The ZANU-PF private political rally attended by Mugabe quite plainly was not "in connection with the United Nations." A contrary interpretation strains the meaning of that phrase beyond its natural import.

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[5] *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 981 (D.C. Cir. 1965), on which the Government heavily relies, involved a libel in personam claim, not a claim under the TVPA or the ATS. Indeed, the Government's position in this case and its extensive reliance on *Hellenic*, *see* Opp. 18-19, is precisely the position that the State Department presented to Congress—and that Congress rejected in enacting the TVPA.